UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

STATION CASINOS, INC., ALIANTE GAMING, LLC, d/b/a ALIANTE STATION CASINO + HOTEL, BOULDER STATION. INC., d/b/a BOULDER STATION HOTEL & CASINO, PALACE STATION HOTEL & CASINO, INC., d/b/a PALACE STATION **HOTEL & CASINO, CHARLESTON** STATION, LLC, d/b/a RED ROCK CASINO RESORT SPA, SANTA FE STATION, INC., d/b/a SANTA FE STATION HOTEL & CASINO, SUNSET STATION, INC., d/b/a SUNSET STATION HOTEL & CASINO, TEXAS STATION, LLC, d/b/a TEXAS STATION GAMBLING HALL & HOTEL, LAKE MEAD STATION. INC., d/b/a FIESTA HENDERSON CASINO HOTEL, FIESTA STATION, INC., d/b/a FIESTA CASINO HOTEL, and GREEN VALLEY RANCH GAMING, LLC, d/b/a GREEN VALLEY RANCH RESORT SPA CASINO, a single Employer

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION LOCAL 165, affiliated with UNITE HERE, AFL-CIO Cases 28-CA-023436 28-CA-062437

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

Station Casinos, Inc. (Respondent) has taken exception to the Decision and Recommendation of Administrative Law Judge Gerald M. Etchingham (ALJ). Respondent seeks to persuade the Board to both disregard the well-reasoned credibility determinations of the ALJ and to ignore the record evidence. Instead, Respondent seeks to convince the Board

to give deference to Respondent's version of the "facts" no matter how unsupported they may be.

II. Respondent's Exceptions

A. Respondent Overstates the Record

In considering Respondent's exceptions and the arguments in support thereof, the Board should exercise caution and carefully examine the record. In its Brief in Support of Exceptions, Respondent included a brief section titled "Statement of the Case." (RBX 2-3)¹ While the section consists of several paragraphs, only the first is of substance which extents beyond the procedural matters related to the case. Of particular concern is the Respondent's inclusion of "facts" not part of the record in the instant proceeding or part of the factual findings of Administrative Law Judge Geoffrey Carter (ALJ Carter) in his decision in the prior proceeding involving the same parties (See JD(SF)59-11) which the ALJ subsequently adopted. More specifically, Respondent makes the following unsupported assertion in its "fact" section:

Despite the Unions repeated demands, Stations has refused to enter into a card check agreement with the Union, instead insisting that its Team Members be permitted the statutory right to indicate whether the Union should represent them by participating in a secret ballot election. However, the Union refuses to petition for such an election. Instead, in February 2010, in the midst of the worst economic crisis since the Great Depression and Station's filing of bankruptcy under Chapter 11 of the U.S. Bankruptcy Code, the Union officially kicked off its unfair labor practice ("ULP") campaign to increase pressure on the Station to agree to card check recognition. (RBX 2)

Respondent's inclusion of the above-referenced language is inappropriate. Other than reference to Respondent's bankruptcy filing, the record or the adopted factual findings of ALJ

RBX___ refers to Respondent's Brief in Support of Exceptions. Tr. __:__ refers to transcript page followed by line or lines of the unfair labor practice hearing held between October 18, 2011 and October 20, 2011. ALJD __:_ refers to JD(SF)-05-12 issued by ALJ Etchingham on February 2, 2012, followed by page and line.

Carter are devoid of any details which support Respondent's "factual" representations.

Respondent's representation is baseless and should be stricken from its Brief in Support of Exceptions, as a party is precluded from attempting to reach beyond the record to supports it exceptions. See *A.J.R. Coating Corp.*, 292 NLRB 148 fn. 1 (1988) (the Board struck portions of respondent's brief in support of exceptions which made reference to extra-record evidence); *Chicago Tribune Co.*, 304 NLRB 665 fn. 1 (1991).

B. Credibility Determinations

The bulk of Respondent's exceptions consist of challenges to the credibility determinations of the ALJ. To support its exceptions, Respondent makes several different arguments, all of which require the application of the same legal standard. Respondent should prevail on its numerous, duplicative, and unsupported exceptions only if the Board is willing overrule its long established policy of not overruling the credibility resolutions of an administrative law judge, absent overwhelming evidence.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. 1951). Respondent's numerous arguments are not supported by the record and provide absolutely no basis for reversing the findings of the ALJ.

In rendering his Decision, the ALJ carefully addressed the credibility of each witness, weighed the evidence, and, where appropriate, addressed any issues that affected his credibility resolutions. Respondent's attempt to parse out the ALJ's Decision while ignoring his reasoning and the basis for his findings demonstrates the weakness in Respondent's arguments. For example, Respondent argues that the clear preponderance of the evidence

fails to support the ALJ's credibility resolutions with respect the allegation contained in Paragraph 6(b). Respondent takes exception to the ALJ's conclusion despite the testimony of three witnesses – Adolfo Gaspar (Gaspar), Martha James (James), and Maria Susana Lopez (Lopez) – each of whom provided corroborating details of the material event and conduct alleged in the Complaint. Respondent takes exception to the ALJ's finding that the testimony of Assistant Room Chef Walter Phillips (Phillips) was "outweighed by the corroborated non-supervisor testimony [of Gaspar, James, and Lopez]" and that his testimony "is worthy of belief especially when unsubstantiated by [Candace] Cullen whom Phillips swore ran the October 7 huddle and spoke to Gaspar in his place." (RBX 3-5)

Respondent's first exception relies entirely on Phillips' testimony that Room Chef Candace Cullen (Cullen) held the October 7, 2011,² meeting. The basis of Respondent's first exception relies on Respondent's assertion that Phillips' testimony was corroborated by James based on the following response during cross examination:

- Q: And at the October 7th, 2010 huddle, your testimony is that Chef Walter talked about working in the kitchen, that kind of stuff. Can you recall what Chef Walter talked about specifically during the October 7th, 2010 huddle?
- A: No.
- **O:** I'm sorry?
- A: No.
- Q: Thank you. Chef Candice often conducted huddles in September and October of 2010, is that correct?
- A: Yes.
- Q: And Chef Candice conducted huddles -- excuse me -- strike that. Chef Walter conducted huddles only when Chef Candice wasn't present, isn't that correct?
- **A:** Right. (Tr. 305:20-25; 306:1-8)

Respondent's argument, however, seeks to have the Board ignore James' testimony wherein she unequivocally testified that Phillips, not Cullen, made the statements alleged in

Unless otherwise noted, all foregoing dates referenced in this Brief occurred in 2011.

the Complaint based on a response to a general question asked during cross-examination. (See Tr. 297:22-25; 298; 299:1-4) Moreover, while Cullen was no longer employed by Respondent on the date of the hearing, no reasons were offered for why she could not have been subpoenaed to testify. Prior to the commencement of the hearing, Respondent issued several subpoenas to witnesses it intended to call. (See ALJD 5) The record, however, lacks any evidence that a subpoena was issued to Cullen, evidenced by the ALJ comment that while "Phillips testified that Cullen no longer worked at Respondent at the time of the trial, there was no evidence presented by Respondent showing her whereabouts at the time of the trial were unknown and that she could not be subpoenaed to testify with reasonable effort."

(ALJD 10, fn. 15)

Respondent also argues that the ALJ committed reversible error because he credited "fabricated testimony" when he concluded that Gaspar's "chronology of events and detailed recollection of the October 7, 2010, huddle" were "corroborated" by Lopez and James. (RBX 6) Respondent's argument appears to rely heavily on the fact that Phillips' denial that he ran the meeting on October 7 was particularly memorable to him because it was a "few days before" his birthday. (Tr. 405: 13-20) Respondent argument appears to suggest that because neither James nor Lopez were able to provide examples of how they could be absolutely certain (like Phillips) that the incident in question took place on October 7 - based on a factor other than the actual occurrence of the incident – their testimony must be fabricated. Such an argument requires one to accept that an unfair labor practice, such as an employer's threat of discharge directed at employees for engaging in protected activity would not be sufficiently memorable to credit the testimony of a witness whose sole recollection of the event was its occurrence. Similarly, Respondent's assertion that the testimony given by James was

somehow fabricated because she was asked by Gaspar whether she recalled the October 7 incident is baseless as there is no evidence that Gaspar did anything other than attempt to find co-workers who recalled the incident.

Respondent further contends that the ALJ "erred in crediting unreliable testimony" because he credited the testimony of Lopez who, according to Respondent is "not fluent in English." Respondent's arguments relies entirely on Lopez's testimony that there was "a lot" that she did not understand. The fact that Lopez may have had difficulty understanding certain things that were said during the huddle does not establish that she failed to comprehend everything that was said or that her lack of understanding is attributable to her proficiency in the English language. In fact, Lopez's testimony was credited by the ALJ as reliable. (ALJD 9:15-29) Moreover, the ALJ, where appropriate, considered the English language proficiency of witnesses when making credibility resolutions. (See ALJD 9:22-27; fn. 13) Despite having had the opportunity, Respondent did not offer any evidence that huddles are held in any language other than English or that Lopez has had trouble understanding what takes place in huddles in the past. The fact that huddles are used to communicate important company information and that employees are expected to understand what is communicated at huddles, places Respondent in the difficult situation of arguing that while Lopez did not understand what took place on October 7, she understands what takes place on all other days.

Respondent's final two arguments relating to the ALJ's credibility resolutions are similarly meritless. Respondent contends that the ALJ committed reversible error by relying upon *S.E. Nicolas, Inc.*, 148 NLRB 556 (1987), to credit the testimony of Gaspar, Lopez, and James based on their continued employment with Respondent. Contrary to Respondent's

arguments, the ALJ was well within his discretion to credit the General Counsel's witnesses, based upon, among other things, the fact that they were testifying against their interest because of their current employment with Respondent. To most witnesses, testifying before a Judge is a terrifying ordeal. However, this is magnified when one is required to testify against an employer whoa arguably holds one's livelihood in its hands. It is for this reason that an employee's continuing employment by a respondent may be properly weighed and considered in resolving credibility, based on the particularly reliability of such witnesses. In *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), the Board held that:

...every reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the time of the hearing.... The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. (footnote omitted)

Similarly, in *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977), an administrative law judge, with Board approval, observed that the testimony of current employees that is adverse to their employer is "... given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." The fact that the testimony of each witness offered no opportunities for individual advancement or gain should not be overlooked, especially in light of Respondent's prior conduct.

To support its argument, Respondent cites *United States Postal Service*, 268 NLRB 1385, 1388, fn 7 (1984) and *UPS Supply Chain Solutions, Inc.*, 357 NLRB No. 106, slip op. at 3, fn 15 (2011), for the purpose of correctly noting the proposition that the Board "does not recognize enhanced credibility due to a witness' current employment status" *where their testimony is otherwise unreliable*. In the instant case, however, Respondent has failed to show that the testimony of any of the General Counsel's witnesses was unreliable based on

embellishment seen in *United States Postal Service*, poor recollection as was the case in *UPS Supply Chain Solutions*, or any other reason.

Finally, Respondent argues that the ALJ "erred in failing to draw an adverse inference" from the General Counsel's "failure to call additional Team Members in support of its case." (RBX 8) The record evidence establishes that approximately 10 to 12 employees participated in the team member huddle on October 7 where Phillips spoke. (Tr. 243:10-12; 299:5-7) The General Counsel called a total of three witnesses to support the allegation alleged in the Complaint. Having established the prima facie elements through the testimony of the three witnesses and for purposes of judicial efficiency, not every potential witness was called and questioned about their recollection of what took place during the huddle. Despite having had the opportunity, however, Respondent declined to call or subpoena employees who may have been present at the October 7 huddle for purposes of rebutting the testimony of the General Counsel's witnesses. With access to its employees' work schedules and its ability to subpoena those employees, Respondent was in the best position to call other witnesses to rebut the General Counsel's case. It failed to do so. By its request that the Board draw an adverse inference on the basis that the testimony of three witnesses is not enough to support an allegation, Respondent seeks to turn the burden of proof on its head and to mask Respondent's failure to support its uncorroborated denial. The Board should soundly reject Respondent's attempt to re-write the basis for adverse inferences and undo the ALJ's wellfounded credibility determination.

While Respondent further takes exception to the ALJ's legal conclusion that Phillips' conduct was coercive and thus unlawful, its argument is based on the exceptions discussed above. In it exception, Respondent does not appear to dispute the coercive nature and effects

of the allegation. Rather, Respondent disputes the truth of the allegation based on the credibility resolutions of the ALJ. Such an argument duplicates those already set forth in its preceding exceptions and arguments in support thereof.

III. CONCLUSION

It is respectfully requested that the Board find that Respondent's exceptions are without merit and affirm the ALJ's decision, save for those matters to which the General Counsel has filed his exceptions.

Dated at Las Vegas, Nevada, this 15th day of March 2012.

/s/ Pablo A. Godoy

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/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that the **ACTING GENERAL COUNSEL'S ANSWERING BRIEF** in Cases 28-CA-023436 and 28-CA-062437, was served via E-Gov, E-Filing, and electronic mail, on this 15th day of March 2012, on the following:

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